

Brown does not expressly claim to have satisfied this exhaustion requirement. Rather, he asserts the requirement “appears to be” non-jurisdictional and subject to judicial discretion. Doc. #: 45 at 3. Brown states he has “pursued his rights and extraordinary circumstances have stood in his way,” and therefore the Court should “toll” the statutory requirement. *Id.* In essence, Brown asks the Court to waive the requirement.

This Court previously has concluded the exhaustion requirement in § 3582(c)(1)(A) is mandatory and not waivable or subject to discretion. *See, e.g., United States v. Allen*, No. 1:19-cr-98-10, 2020 WL 1878774, at *1 (N.D. Ohio Apr. 15, 2020) (citing *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016)) (“Mandatory exhaustion statutes . . . establish mandatory exhaustion regimes, foreclosing judicial discretion.”). Congress clearly instructed that a court may not modify a term of imprisonment unless the defendant satisfies the exhaustion requirement. *Id.*

The cases cited by Brown are not to the contrary. In *Kontrick v. Ryan*, the Supreme Court discussed, but declined to reach, whether certain bankruptcy claims rules are subject to equitable tolling. 540 U.S. 443, 457 (2004). *Hamer v. Neighborhood Housing Services of Chicago* likewise did not determine that non-jurisdictional mandatory claim-processing rules are subject to equitable exceptions. *See* 138 S. Ct. 13, 18 n.3 (2017). Finally, *Pace v. DiGuglielmo* makes clear that even if § 3582(c)(1)(A) were subject to equitable exceptions, Brown is not entitled to such exceptions because he makes no showing that he has been “pursuing his rights diligently.” 544 U.S. 408, 418 (2005). Brown does not state that he asked the BOP to make a motion on his behalf; he does not identify any steps he took to obtain relief through the BOP.

This Court is sympathetic to Brown’s position. His fears regarding confinement during COVID-19 undoubtedly are legitimate, especially because he has asthma. However, the existence of a pandemic does not authorize courts to usurp the BOP’s authority and empty prisons. The BOP,

not this Court, has the most up-to-date knowledge on the status of COVID-19 in its prisons and what remedial measures are required. Fortunately, as of this date, there do not appear to be any confirmed cases of COVID-19 at FCI Morgantown.² *Covid-19 Coronavirus*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> (last visited May 21, 2020).

Ultimately, § 3582(c)(1)(A) contains a statutory exhaustion requirement. Brown has not satisfied, and the Court does not have the authority to waive or toll, this requirement. Thus, the Court cannot review the Motion, **Doc #: 45**, and therefore it is **DENIED**.

IT IS SO ORDERED.

/s/ *Dan Aaron Polster* May 21, 2020

Dan Aaron Polster
United States District Judge

² The Court acknowledges Brown's concern regarding a possible transfer to FCI Elkton. Judge Gwin has ordered that certain persons, including those with moderate to severe asthma, who are incarcerated at Elkton be given compassionate release, home release, parole, community supervision, or, if ineligible for any of those, be transferred to another BOP facility. *Wilson v. Williams*, Case No 4:20-cv-794, Doc. #: 22, 85. Thus, if Brown is transferred and his medical condition qualifies him to relief under Judge Gwin's order, his concerns will be addressed.